89-232

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PORT CLINTON FISH COMPANY

PETITIONER

VS.

THE STATE OF OHIO

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE SUPREME COURT OF OHIO APPLIED ERRONEOUSLY THIS COURT'S GENERAL RULE SET FORTH IN HUGHES V. OKLAHOMA, 441 U.S. 322 (1979), IN HOLDING THAT A STATUTE WHICH CRIMINALIZES POSSESSION OF WALLEYE LAWFULLY OBTAINED OUTSIDE OHIO, AND THEN BROUGHT INTO OHIO, IS NOT AN UNCONSTITUTIONAL INTERFERENCE WITH INTERSTATE AND FOREIGN COMMERCE.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, Port Clinton Fish Company through its counsel, petitions for a writ of certiorari to review the decision and judgment of the Ohio Supreme Court in this case, entered on May 24, 1989.

I.
OPINIONS BELOW

The Opinion of the Ohio Supreme Court is reported at 43 Ohio St. 3d 93. The Opinion of the Ohio Court of Appeals for the Sixth District is attached as Appendix B. The Opinion of the Toledo Municipal Court is attached as Appendix C.

II.
JURISDICTION

The Opinion of the Ohio Supreme court was entered on May 24, 1989. The jurisdiction of this Court is invoked pursuant to U.S. Const. art. I section 8, cl. 3.

III.
CONSTITUTIONAL PROVISIONS AND STATE STATUTES AND REGULATIONS INVOLVED

U.S. Const. art. I section 8, cl. 3 provides in pertinent part:

> The Congress shall have the Power. . . to regulate the commerce with foreign Nations, and among the several states. . .

Ohio Rev. Code Ann. Section 1533.63 (Anderson 1986) provides in pertinent part:

> No licensed commercial fisherman, or person required to have a commercial fishing license under Section 1533.34 of the Revised Code, shall take walleye . . . from Lake Erie or its tributaries . . . All fish brought into the state from another state or country shall be subject to the laws of this state.

The Ohio Admin. Code Section 1501:31-3-02 (1984) provides in pertinent part:

> (A) It shall be unlawful for any person to sell, buy, transport, take, catch, or possess . . . a walleye . . . less than 15-1/2 inches in length, a walleye fillet or part fillet of a length less than 9-1/2 inches . . . (E) It shall be unlawful for any person to take, possess, sell, buy, transport, or cause to be transported a quantity, container, boat load, catch, or haul of any species of fish referred to in this rule containing more than ten percent by weight of undersize round filleted or headless fish.

IV.
STATEMENT OF THE FACTS

Petitioner Port Clinton Fish is a corporation organized under the laws of the State of Ohio, doing business as a retail and wholesale distributor of fish in Ohio. Petitioner lawfully purchased a quantity of walleye in Canada from Olmstead Foods, a Canadian company. (Walleye is a freshwater game fish and a popular food item.) These walleye were transported from Canada to petitioner's warehouse in Toledo for the purpose of distribution. On December 17, 1985, while these walleye were in the possession of the petitioner, officers from the Ohio Division of Wildlife seized the quantity of walleye. The officers determined the boxes of walleye marked "Olmstead Foods" contained forty-two percent (42%) undersized walleye by weight. Petitioner was charged with

possession of walleye more than ten percent (10%) undersized by weight, in violation of Ohio Rev. Code Ann. Section 1533.63 and Ohio Admin. Code Section 1501:31-3-02(A).

The Toledo Municipal Court denied the defendant-appellant's Motion for Judgment of Acquittal on the basis that the effect of the Ohio Administrative Code is not an unconstitutional interference with interstate and foreign commerce without a legitimate state purpose. The matter proceeded to trial from which defendant was found guilty. The Court of Appeals for the Sixth District of Ohio affirmed. The Ohio Supreme Court affirmed, holding that with "a legitimate state purpose for the protection and propagation of wildlife in the State of Ohio as its basis, and only minimal intrusion on the affected parties, Ohio Adm. Code 1051:31-3-02 does not violate the Commerce Clause of the United States Constitution or interfere with freedom to contract." State of Ohio v. Port Clinton Fish Co., 43 Ohio State 3d 93 (1989). (paragraph 1 of the syllabus.)

V.
REASONS FOR GRANTING A WRIT

The Ohio Supreme Court has decided this case in conflict with the Court's general test for interference with interstate commerce set forth in Hughes v. Oklahoma, 441 U.S. 322 (1979).

Ohio Rev. Code Ann. Section 1533.63 (Anderson, 1984) prohibits the commercial fishing and taking of walleye in Ohio waters. Therefore, any walleye distributed or possessed commercially in the State of Ohio must, of necessity come from waters outside the territorial boundaries of Ohio. This includes Canada, which is a major source of walleye. These walleye transported into Ohio through interstate commerce and Canada are an article of interstate commerce. See, State v. Switzer, 22 Ohio St. 2d 47 (1970).

Chapter 119 of the Ohio Revised Code allows the Division of Wildlife to issue administrative rules regulating the possession, buying, or selling of walleye. Pursuant to this, Ohio Admin. Code Section 1501:31-3-02 makes it unlawful to possess walleye less than fifteen and one-half inches in length, or a walleye fillet of a length less than nine and one-half inches. When applied to commercial fisherman, this statute relates solely to walleye originating from waters other than those within the territorial boundaries of Ohio.

Following the general test set forth in Hughes v. Oklahoma, 441 U.S. 322 (1979), these regulations are unconstitutional as applied to commercial fishermen. Hughes states this general rule at 36.

> (1) Whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) Whether the statute serves a legitimate local purpose; and if so,

(3) Whether alternative means could promote this local purpose as well without discriminating against interstate commerce. All three elements must be satisfied in order to uphold the regulation or statute.

The Supreme Court of Ohio found that the first prong of this test was met, and relied on Hosko v. Teater (Jan. 29, 1985), N.D. Ohio No. C80-542, unreported at 9. (Magistrate's Report and Recommendation adopted by Order of Court dated March 25, 1985.) In Hosko, the Federal District Court held that Section 1533.63, which bans all commercial fishing in Ohio, was constitutional because local and foreign fishing industries were affected in the same way. Neither could take walleye out of the waters of Ohio. However, the defendant disagrees with the decision of Hosko. Ohio Admin. Code Section 1501:31-3-02 does not affect local and foreign enterprise in the same manner. Since commercial fishing is prohibited in Ohio, only interstate commerce , that is, walleye from other states and Canada is affected by these regulations. Ohio Rev. Code Ann., Section 1533.63 (Anderson 1984) states in paragraph 5, "All fish brought into the state from another state or country shall be subject to the laws of this state." This is a discrimination against interstate commerce. Therefore, since these regulations are not incidental to interstate commerce, but relate solely to interstate commerce, Ohio Admin. Code Section 1501:31-3-02 fails to meet the first requirement of the Hughes test.

In discussing the second element of the Hughes test, the Ohio Supreme Court states:

> Obviously, the purpose of the statute and regulation is protection and conservation of wildlife, a legitimate state interest. State v. Port Clinton Fish Co. at 95.

The defendant agrees that the protection and conservation of wildlife within the boundaries of Ohio is a legitimate state interest, but the wildlife affected by these regulations, in this case, is from Canada. Justice Holmes clearly states this intent to regulate Canadian walleye in his concurrence. He states:

> The availability of the greatest number of walleye for sport fishing depends not only upon the manner of the control and management of the species in the American portion of the waters of Lake Erie, but also upon the control and protection of walleye in Canadian waters.

He states further:

> Obviously, Ohio authorities may not mandate the reasonably necessary wildlife management provisions to be applied in Canadian waters. The next best approach then is, as was done here, to apply regulations to the species which are brought into Ohio.

This is just an indirect way to regulate Canadian and other states' fish, and does not constitute a legitimate state purpose. The walleye possessed by petitioner are not from Ohio, but are from Canada. Therefore, since when applied to commercial fishermen, Ohio Admin. Code Section 1501:31-3-02(A) and (E) do not affect walleye originating from Ohio waters, no legitimate local purpose is served, and the second prong of the Hughes test is not met[1].

The Supreme Court of Ohio also found that the third prong of the Hughes test was met, by stating:

> Requiring that Ohio fish distributors observe a regulation clearly designed to ensure a plentiful walleye population in the future (and allowing these parties a ten percent (10%) 'margin of error') is a feasible and practical way of accomplishing the intended goal. State v. Port Clinton Fish Co. at 95.

[1] A review of statues of the states that border Lake Erie demonstrates the inconsistency of regulation. Pennsylvania allows the purchase or sale of fish legally taken from waters outside the state. 30 Pa. Cons. Stat. Ann. Section 3311 (a) (Purdon Supp. 1989). New York allows the importation of walleye without respect to size. N.Y. Fish and Wildlife Law Section 11-1703 (McKinney 1984). Michigan allows the importation of walleye if lawfully captured under the laws of the state or country where caught. Mich. Comp. Laws Ann. Section 308.14 (West 1984).

However, there is no logical reason to require Ohio fish distributors to observe a size limit regulation which will ensure a walleye population for Ohio in the future when these fishermen do not take fish out of the waters of Ohio. It is true that Ohio shares a common border with Canada across Lake Erie, however, there is no proof the subject fish came from Lake Erie. Also, the regulation purports to criminalize possession of all undersized walleye even if caught in Western Canada or in lakes other than Lake Erie. Regulating the sizes of walleye from Manitoba does not "ensure a plentiful walleye population in the future" in Ohio.

Furthermore, there already are alternative means to promote Ohio's purpose of ensuring a future walleye population. The most obvious is Ohio Rev. Code Ann. Section 1533.63 (Anderson 1986) banning commercial fishing of walleye, and although the Ohio Supreme Court disagrees, State v. Port Clinton Fish Co., 43 Ohio St. 3d at 95, the recordkeeping provisions of Ohio Rev. Code Ann. Section 1533.63 ensure that walleye sold commercially in Ohio do not come from Ohio water, which means the size of the walleye is of no local interest to Ohio.

Also contrary to the Ohio Supreme Court, State v. Port Clinton Fish Co. at 95, the intrusion on the affected parties and interstate commerce is not "de minimus." In order to buy and sell walleye, Ohio distributors must contract with fishermen from other states and Canada. These fishermen legally catch a product, but are unable to sell it to Ohio distributors, and Ohio distributors are prevented from acquiring a valuable product. These other means, the banning of commercial fishing of walleye in Ohio waters, and the strict recordkeeping provision, could promote Ohio's local purpose of ensuring a future walleye as well or better than regulations restricting the size of walleye imported into Ohio through interstate commerce.

Since Ohio Admin. Code Section 1501:31-3-02, when applied to commercial fishermen, relates only to interstate commerce, its effects are not incidental. The regulation serves no legitimate local purpose when applied to commercial fishermen because they are prohibited from taking walleye out of the waters of the State of Ohio. There are alternative means of preserving the walleye population in Ohio, such as banning commercial fishing of walleye. Therefore, this regulation does not meet the three prong test of Hughes.

This case presents an important federal issue regarding Ohio's interference with the interstate transportation and sale of walleye. The challenged regulations allow the State of Ohio to regulate the size limits of fish harvested in other states and Canada. Since these walleye are not from Ohio waters, Ohio has no local interest in their protection. This case has set a precedent of allowing one state to regulate wildlife that comes only from other states and Canada, in violation of U.S. Const., art. 1, section 8 cl.3.

VI.
CONCLUSION

The petition for a writ of certiorari should be granted.

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THE STATE OF OHIO APPELLEE, v. PORT CLINTON CLINTON FISH COMPANY, APPELLANT.

[Cite as State v. Port Clinton Fish Co. (1989), 43 Ohio St. 3d 93.]

Criminal law — Possession of undersized walleye — R.C. 1533.63 and Ohio Adm. Code 1501:31-3-02(A) are constitutional under Commerce Clause.

With a legitimate state purpose for the protection and propagation of walleye in the state of Ohio as its basis, and only minimal intrusion on the affected parties, Ohio Adm. Code 1501:31-3-02 does not violate the Commerce Clause of the United States Constitution or interfere with freedom to contract.

(No. 88-258—Submitted March 8, 1989—Decided May 24, 1989.)

Appeal from the Court of Appeals for Lucas County, No. L-87-148.

Appellant, Port Clinton Fish Company ("Port Clinton"), indisputedly, is an Ohio corporation engaged in both retail and wholesale distribution of fish. On December 17, 1985, Ohio Division of Wildlife officers entered appellant's facility in Toledo and inspected seven boxes of walleye fillets. The boxes were labelled "Olmstead Foods," and were allegedly purchased from a Canadian company. Upon inspection, the officers determined that the boxes contained forty-two percent "undersized" walleye by weight. The fish were seized and appellant company was charged with possession of walleye "more than 10% undersize[d] by weight" in violation of R.C. 1533.63 and Ohio Adm. Code 1501:31-3-02(A).

APPENDIX A

1.

After trial in the Toledo Municipal Court, appellant was found guilty and appealed that judgment to the court of appeals. The appellate court affirmed, holding that R.C. 1533.63 and Ohio Adm. Code 1501:31-3-02 do not represent an unconstitutional interference with or burden on interstate commerce. Further, the court of appeals ruled that enforcement of the regulations did not abridge appellant's right to contract.

The case is now before this court pursuant to the allowance of a motion for leave to appeal.

Mark S. Schmollinger, assistant prosecuting attorney, *Anthony J. Celebrezze, Jr.*, attorney general, and *John McManus*, for appellee.
Connelly, Soutar & Jackson, Reginald S. Jackson, Jr., and *Steven R. Smith* for appellant.

Hoffman, J.

I.

As amended in 1984, R.C. 1533.63 prohibits commercial fishing of walleye within the boundaries of the state of Ohio, and furthermore states that "walleye * * * originating from outside of this state may be possessed for sale, bought, or sold subject to the orders of the division of wildlife." Prior to its amendment in 1984, R.C. 1533.63 explicitly regulated undersized walleye along with other fish such as yellow perch, catfish, etc. Now the same "undersize" restrictions pertaining to walleye that were in R.C. 1533,63 are codified in Ohio Adm. Code 1501:31-3-02, legal length and weight of certain fish.

That regulation provides in pertinent part:

"Under authority of section 1533.63 of the Revised Code and division (D) of section 1531.08 of the Revised Code, the chief of the division of wildlife hereby orders that throughout the state:

"(A) It shall be unlawful for any person to sell, buy transport, take, catch, or possess * * * a walleye * * * less than fifteen and one-half inches in length, *a walleye fillet or part fillet of a length less than nine and one-half inches* * * * "
* * *

(E) It shall be unlawful for any person to take, possess, sell, buy, tranport, or cause to be transported, a quantity, container, boat load, catch or haul of any species of fish referred to in this rule *containing more than ten percent by weight of undersized round, filleted or headless fish.*"
(Emphasis added.)

The issue herein is whether the subject regulations, which criminalize the possession of undersize walleye, are violative of the Commerce Clause of the United States Constitution. Because R.C. 1533.63 now prohibits commerical fishing of walleye in Ohio waters, all such fish traded commercially in the state must of necessity be caught outside Ohio.

The test we employ has been circumscribed by the United States Supreme Court as follows:

"* * * (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes v. Oklahoma* (1979), 441 U.S. 322, 336.

The elements of the above test must be met in the conjunctive if the regulation being examined are to be upheld.

Turning to the first prong of the *Hughes* test, we find the challenged regulations are "evenhanded" in that they neither favor local enterprise nor facially discriminate against interstate

commerce. In reviewing precisely the same regulations as are presently before us, the United States District Court noted:

"The statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce. Indeed, those most adversely affected are members of the local commercial fish industry. No Ohio industry is placed in a better position by the fishing restrictions than any similar out-of-state commercial fisherman. Commercial fishing of walleye has been banned to all. If anything, the restrictions act as a boon to out-of-state fisherman who may market their walleye in Ohio without local competition." *Hosko v. Teater* (Jan. 29, 1985), N.D. Ohio No. C80-542, unreported, at 9. (Magistrate's report and recommendation adopted by order of court dated March 25, 1985.)

The instant regulations meet the first element of the *Hughes* test.

We need not dwell on the second element of the *Hughes* test. Obviously, the purpose of the statute and regulations is protection and conservation of wildlife, a legitimate state interest. Appellant's contention that "these regulations * * * have the effect of erecting a trade barrier" is without merit.

The third element of the *Hughes* test considers whether alternative means could promote the "local purpose" as well without infringing in any manner upon interstate commerce. Port Clinton maintains that since amended R.C. 1533.63 forbids commercial fishing of walleye in Ohio, it is superfluous to burden Ohio's fish distributors with length-limit regulations. Appellant further contends that the record-keeping provisions of R.C. 1533.63 (sales, purchases, and labelling) serve the indentical purpose of Ohio Adm. Code 1501:31-3-02 and together with the ban render said regualtions unnecessary.

With the primary purpose of the length limitations being the protection of immature walleye, we see no better, *i.e.*, less intrusive, means for the propagation of the species than the instant regulatory mechanism. Requiring that Ohio fish distributors observe a regulation clearly designed to ensure a plentiful walleye population in the future (and allowing these parties a ten-percent "margin of error") is a feasible and practical way of accomplishing the intended goal. Additionally, the intrusion upon the affected parties (Ohio fish distributors) and the flow of commerce is *de minimis*.

Applying the *Hughes* standard, the instant regulations do not contravene the Commerce Clause of the United States Constitution. See *State v. Millington* (Fla. 1979), 377 So 2d 685, where in an identical situation (defendant in violation of possessing undersize shrimp) the Florida Supreme Court ruled the pertinent state statute not unconstitutional on Commerce Clause grounds.

II.

Finally, appellant argues in the alternative that the instant regulations disrupt the "right to contract." Appellant provides no persuasive authority to support its position. Simply put, appellant is permitted to contract for the purpose and sale of legal size walleye with any party it desires.

We conclude by holding that with a legitimate state purpose for the protection and propagation of walleye in the state of Ohio as its basis, and only minimal intrusion on the affected parties, Ohio Adm. Code 1501:31-3-02 does not violate the Commerce Clause of the United States Constitution or interfere with freedom to contract.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT and H. BROWN, JJ., concur.
JOHN R. HOFFMAN, J., of the Fifth Appellate District, sitting for RESNICK, J.

HOLMES, J., concurring. In wholeheartedly concurring I believe it to be important to point out in support of the legitimate state purpose of such regulations some additional factors. The propagation and managment of walleye for the recreational taking of this fish in the waters of Lake Erie has proven to be a great asset to the state of Ohio, not only to the angler, but also to those serving the needs of this great outdoor sport—such as boat and motor sales and servicing, tackle dealers, marinas, restaurants, charters, and many others.

The availability of the greatest number of walleye for sport fishing depends not only upon the manner of the control and managment of the species in the American portion of the waters of Lake Erie, but also upon the control and protection of walleye in Canadian waters. The mobility of walleye from one side of Lake Erie to another, crossing the international boundary, is a well-known fact of aquatic biology. It follows that the amounts and size of fish taken in the Canadian portion of Lake Erie directly affects the number of the species available for Ohio sportsmen.

Obviously, Ohio authorities may not mandate the reasonably necessary wildlife mangement provisions to be applied in Canadian waters. The next best approach then is, as was done here, to apply regulations to the species which are brought into Ohio.

The majority's position can simply be supported here to show that there is a real and legitimate purpose in promulgating the Department of Natural Resources' regulations for the protection and propagation of walleye.

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF LUCAS

C.A. NO. L-87-148

State of Ohio
APPELLEE
-VS-
Port Clinton Fish Company
APPELLANT

APPEAL FROM
TOLEDO MUNICIPAL COURT
NO. CRB 86-11441

DECISION AND
JOURNAL ENTRY

DATE December 18, 1987

This case is before this court on appeal from a judgment of the Toledo Municipal Court.

Appellant, the Port Clinton Fish Company, was charged with unlawfully possessing undersized walleye fish in violation of R.C. 1533.63 and O.A.C. Rule 1501:31-3-02(A).

On March 19, 1987, appellant appeared with counsel for trial in Toledo Municipal Court. The state of Ohio and appellant stipulated that on December 17, 1985, officers of the Ohio Fish and Game Department entered the Port Clinton Fish Company located at 1949 Broadway, Toledo, Ohio. The officers entered the cutting room and observed seven (7) boxes of walleye fish marked I.Q.F. The fish in the boxes were walleye fillets allegedly from Olmstead Foods of Canada. Upon a complete inspection, it was determined that the boxes contained forty-two (42) percent undersized walleye.

Appellant moved for a judgment of acquittal on the basis that the statute and the regulation are in violation of the Ohio and United States Constitutions. The court found the motion for a judgment of acquittal not well taken and found appellant guilty. Appellant was fined $100 and costs. It is from that judgment which appellant filed a timely notice of appeal asserting the following as his sole assignment of error:

> "The trial court erred in denying the motion of defendant for acquittal."

In essence, the appellant in contending that a regulation which criminalizes the possession of walleye lawfully obtained outside Ohio is an unconstitutional interference without due process of law. Similar issues have been considered and found without merit by this court in State v. Rohr Fish Co. (April 10, 1981), Lucas App. No. L-80-260, unreported. However, the Rohr case was decided prior to the amendment of R.C. 1533.63 wherein commercial fishing of walleye was banned in Ohio. Hence, there remains an issue to be resolved by this court as to whether the banning of commercial fishing of walleye necessitates the overruling of Rohr, supra. All of the other issues raised by appellant have been considered and decided many times by this court. O.A.C. 1501:31-3-02 was considered by this court in Dept. Of Natural Resources v. White's Landing Fisheries, Inc. (Sept. 27, 1985), Erie County App. No. E-85-10, unreported. While the issue in that case involved yellow perch, this court considered the rule in its entirety and found that Ohio Adm. Code 1501:31-3-02 is a valid and enforceable regulation. We reaffirm that holding today as it applies to walleye and the prescribed length requirements.

We now proceed to consider whether the amendment to R.C. 1533.63 banning commercial fishing of walleye renders the statute unconstitutional. The Ohio Supreme Court in State v. Switzer (1970), 22 Ohio St. 2d 47, discussed a state's right to pass laws which indirectly affect interstate commerce wherein the court stated at 55:

"This is apparent from an examination of Section 854, Title 16, U.S. Code, which reads:

"'Nothing in this Act [Sections 851-856] shall be construed to prevent the several states and territories from making or enforcing laws or regulations not inconsistent with the provisions of this Act, or from making or enforcing laws or regulations which shall give further protection to black bass and other fish.'

"Applying the federal statutes, we find that under Section 852b, Title 16, U.S. Code, Ohio's statutes cover fish brought into the state once the fish are within the state 'for use, consumption, sale or storage therein * * *.'" [1]

Hence, states have authority to pass laws which give further protection to fish as long as such laws meet the requirements set forth in Hughes v. Oklahoma (1979), 441 U.S. 322. The court in Hughes, supra, stated that such statutes must meet the following test:

"* * * (1) whether the challenged statutes regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." Id. at 336.

R.C. 1533.63 was considered by the court in Hosko v. Teater (N.D. Ohio Jan. 29, 1985), No. C80-542, unreported. In that case the court stated, while addressing the commerce clause,

"In general, the Commerce Clause not only empowers Congress to legislate concerning interstate commerce, but has long been held to also act as a bar to state actions which would discriminate against or unreasonably burden interstate commerce. See Minnesota v. Cloverleaf Creamery, 449 U.S. 456 (1981); Hughes, supra. State legislation which amounts to mere economic protection is almost per se invalid. Philadelphia v. New Jersey, 437 U.S. 617 (1978). In addition, legislation with otherwise valid purposes is also subject to being invalidated if it unreasonably burdens interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

"The statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce. Indeed, those most adversely affected are members of the local commercial fish industry. No Ohio industry is placed in a better position by the fishing restrictions than any similar out-of-state commercial fisherman. Commercial fishing of walleye has been banned to all. If anything, the restrictions act as a boon to out-of-state fishermen who may market *their walleye in Ohio without local competition.

"(*Such out-of-state commercial fishermen can sell walleye in Ohio provided that they meet the legal length requirements imposed by Ohio law (Mosley Dep. p. 51; Mosley Aff.. ¶13).)

"However, a finding that the restrictions in issue operate 'evenhandedly' does not terminate the inquiry into their burden upon interstate commerce. As the Supreme Court, in Pike v. Bruce Church, Inc., supra, stated:

> "'Where the state regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits . . . the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'

"397 U.S. at 142.

"The burden on interstate commerce here is conformity with the fish length requirements governing the legal importation of certain species of fish into the State of Ohio. The state's interest in promulgating such requirements is its law enforcement interest. These requirements do not directly affect or protect Ohio walleye or other Ohio species of fish except insofar as they aid in the enforcement of the restrictions imposed upon commercial fishing in Ohio (Mosley Dep. p. 191; Scholl Aff. ¶16). By regulating the importation and sale of walleye and other species of fish, the State of Ohio seeks to prevent circumvention of its law. This is a legitimate state interest. Andrus v. Allred, 444 U.S. 51 (1979); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936). As a result,

plaintiffs' Commerce Clause challenge to the restrictions in issue must fail."
(Emphasis added.)

From this it can readily be seen that a ban on walleye fishing by commercial fishermen does not give Ohio residents preferential treatment at the expense of non-residents. In addition, the only means of protecting the fish of Ohio is to apply the same law to all undersized walleye fish being possessed in Ohio regardless of its origin. It is a legitimate exercise of police power within the state. The rationale of the exercise of such power is that it operates as a shield against covert depletion of the local supply, thus tending to effectuate the policy of the law by rendering evasion of it less easy. See Bayside Fish Flour Co. v. Gentry (1936) 297 U.S. 422.

Thus, the ban on commercial fishing of walleye in Ohio does not change our holding in State v. Rohr, supra, in any way. We hold that R.C. 1533.63 and O.A.C. 1501:31-3-02 are not violative of the interstate commerce clause and thus do not violate appellant's constitutional rights under the Ohio and United States Constitutions.

In addition, appellant's right to contract is not abridged without due process fo law in that R.C. 1531.08 authorizes the Chief of the Division of Wildlife, Department of Natural Resources to make regulations regarding the taking and possessing of wildlife and the Supreme Court has determined that the Chief is acting in a legislative capacity when so doing. Switzer, supra. Further, appellant is permitted to contract for the purchase of legal size walleye from anyone outside the state of Ohio.

Accordingly, appellant's sole assignment of error is found not well-taken.

On consideration whereof, substantial justice was done the party complaining and the judgment of the Toledo Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Peter M. Handwork, P.J.
Alice Robie Resnick, J.
George M. Glasser, J.
CONCUR.

PRESIDING JUDGE

JUDGE

JUDGE

[1]Athough 16 U.S.C. 854 has been repealed, the rationale in Switzer, supra, still applies. See 16 U.S.C. 3378.

TOLEDO MUNICIPAL COURT
LUCAS COUNTY, OHIO

STATE OF OHIO

V.

PORT CLINTON FISH CO. JUDGMENT ENTRY
CRB86-11441
JUDGE Denise Ann Dartt

March 19, 1987

Case called for trial. State present. Defendant present with counsel. Both Defendant and State enter into stipulations of fact, venue and I.D. of Defendant.

Defendant moves for judgement of acquittal. Upon consideration of Defendant's argument, including the argument of unconstitutionality of the Statute and State's response thereto, the motion for judgment of acquittal is found not well taken and same is hereby denied.

Defendant found guilty. Fine of $100.00 and costs. Stay on fine and costs to 4/20/87.

/s/Denise Ann Dartt
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Martin Hosko, et al.,
Plaintiffs

C 80-542

vs.

Magistrate's Report
and Recommendation

Robert Teater, et al.,
Defendants

This is an action for declaratory, injunctive, and monetary relief commenced under 42 U.S.C. §1983, the Fourteenth Amendment, the Supremacy Clause, and the Commerce Clause of the Constitution. Pending are cross-motions for summary judgment. Upon review of those motions, the parties' memoranda addressing the issues raised therein, and the materials submitted for review, I have concluded that defendants' motion for summary judgment should be granted, and that plaintiffs' motion should be denied.

This action was instituted to challenge the constitutionality of the regulations governing the sale, purchase, transportation, taking, and possession of fish within the State of Ohio. Specifically, plaintiffs challenge the constitutionality of §1533.63 of the Ohio Revised Code, and Ohio Division of Wildlife Regulation 1501:31-3-02. These provisions ban commercial fishing for walleye in the State of Ohio, and place length and weight restrictions upon certain species of fish which may be taken within the State.

I.
ABSTENTION

In their memoranda, defendants contend that this court should abstain from exercising its jurisdiction in this cause. In making this contention, defendants suggest that abstention is required under the standards announced in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Younger v. Harris, 401 U.S. 37 (1971). In examining the defendants' contentions under all of these standards, I do not find myself in agreement that abstention is required.

Abstention permits federal courts to decline or postpone the exercise of the general grant of jurisdiction set forth in Article III of the Constitution. See Pullman, supra. When so exercised, the doctrine allows a state court the opportunity to decide the matters at issue in the federal forum. See Colorado River Water Conservation District v. United States, 424 U.S. 800, 813, reh'g denied, 426 U.S. 912 (1976). However, abstention is an extraordinarily narrow exception to the duty of federal courts to adjudicate controversies, and the Supreme Court has emphasized that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." Id. Indeed, such a procedural posture is justified only where the "order to the parties to repair to the state court would clearly serve an important countervailing interest." Id.

As aptly pointed out by the defendants, the Supreme Court has delineated three categories of abstention. See Colorado River Conservation District, supra, 424 U.S. at 814. Each category represents a set of circumstances which justifiably permit federal courts to decline to adjudicate cases which are otherwise properly before them. Defendants contend that such circumstances exist in this cause.

In making this contention, the defendants rely in part upon the first and oldest form of abstention, created in Railroad Comm'n v. Pullman Co., supra. There the Supreme Court held that abstention may be appropriate when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. 312 U.S. at 501. By abstaining in such cases, federal courts avoid unnecessary adjudication of federal questions and "needless friction with state policies . . ." Id. However, for such deferral to be appropriate, the state law issue present must exhibit qualities of uncertainty and ambiguity. See Wisconsin v. Contantineau, 400 U.S. 433, 438-39 (1971); Colorado River Conservation District, supra, 424 U.S. at 815.

In this case there is no uncertain question of state law; hence, the Pullman doctrine is inapplicable. The statutory provision in issue is clear, and states in no uncertain terms the length requirements for the legal taking and possession of the various species of fish in issue. In addition, Ohio Division of Wildlife Regulation 1501:31-3-02 repeats these restrictions in no uncertain terms with the addition of a commercial ban upon the taking of walleye. This regulation, as promulgated by the Chief of the Ohio Division of Wildlife, is fully within the authority delegated to him by the Ohio General Assembly which has granted him "authority and control in all matters pertaining to the protection, preservation, propagation, possession, and management of the wild animals." O.R.C. ∞1531.08. Within this grant of authority, the Chief may regulate the "[t]aking, possession, transportation, buying, selling, offering for sale, and exposing for sale commercial fish or any part thereof, including species taken, length, weight, [a]nd method of taking. . ." O.R.C. 1531.08(D). No other statutes or regulations conflict with these provisions; nor has any enactment been called to my attention which would suggest that these provisions do not mean exactly what they say. Since there is no uncertain question of state law, and the simple question in this case is whether the provisions are unconstitutional, abstention pursuant to Pullman is not required. See Contantineau, supra, 400 U.S. at 439.

The second category of abstention stems from Younger v. Harris, supra. Under the Younger doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests. In Middlesex Ethics Comm'n v. Garden State Bar Assn., 457 U.S. 423, 432-37 (1982), the Supreme Court enunciated a three-prong test for determining when Younger abstention is appropriate in noncriminal proceedings. This test requires a federal court to inquire 1) whether there are ongoing state proceedings; 2) whether such proceedings implicate important state interests; and 3) whether there is an adequate opportunity in the state proceedings to raise constitutional challenges. United States v. Anderson, 705 F.2d 184, 188 (6th Cir. 1983). Such abstention is required however, only when state court proceedings have been commenced "before any proceedings of substance on the merits have taken place in the federal courts." Hicks v. Miranda. 422 U.S. 332, 349 (1975). See also Hawaii Housing Authority v. Midkiff, ____U.S.____ 104 S. Ct. 2321, 2328, (1984). In all other cases a federal court must fulfill its normal duty to adjudicate federal questions properly brought before it. See id, at____, 104 S. Ct. 2328.

A review of the materials submitted in conjunction with the docket in ths cause reveals that this action was instituted prior to the commencement of any state court proceedings between the parties involved herein. Plaintiffs filed their complaint in this cause on August 28, 1980. Thereafter, on October 30, 1981, the State of Ohio instituted an action in the Court of Common Pleas for Lucas County, Ohio, against a number of the plaintiffs seeking equitable relief and monetary damages from them for allegedly violating the regulations in issue in this cause.* At that time, discovery was merely beginning,

* Numerous other actions against the remaining plaitiffs were also instituted by the State of Ohio in Ohio courts at approximately the same time (Dft's mem. in support of summary judgment, pp. 5-6).

and the summary judgment cut-off date had been established. In short, this cause had not yet proceeded beyond its embryonic stage. As a result, upon this basis alone, considerations of economy, equity, and federalism favor Younger abstention.

However, the application of the three prong test for determining when Younger abstention is appropriate does not support such abstention. At this late date, counsel for the defendants have neither established nor even suggested that any of the stae proceedings remain ongoing.* This is required by the first prong of the test governing the applicability of Younger abstention. Therefore, at this point, this case does not fall within the standard abstention promulgated in Younger, supra.

The final category of abstention relied upon by the defendants is derived from Burford v. Sun Oil Company, 319 U.S. 315 (1943). In Burford the Supreme Court outlined two factors which justify abstention. First, a complex state regulatory scheme must be present which would be disrupted by federal court review; and second, a state created centralized forum of special competence in the particular subject area must exist. Id. at 332-33. In the present case, an arguably complex state regulatory scheme is present which is operated by the State of Ohio Division of Wildlife. However, no centralized forum of special competence has ever been created or exists to administratively or judicially deal with challenges to wildlife regulations and their respective application in individual cases. As a result, application of Burford abstention is also inappropriate.

* Such a showing is crucial to the exercise of Younger abstension which need only be employed where federal intervention would cause interference with state proceeding. J. P. v Desanti, 653 F.2d 1080 (6th Cir. 1981).

II.

RES JUDICATA

In the memoranda attached to their motion, the defendants contend that plaintiffs' action is barred by the doctrine of res judicata. Under that doctrine, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were raised in that action. See Allen v. McCurry, 449 U.S. 90, 94 (1980). This doctrine applies with equal force in suits like the present one where a plaintiff's cause of action is premised upon any of the Civil Rights Acts. See Allen, supra, 449 U.S. 104-105.

A review of the materials submitted by the defendants in support of this portion of their motion clearly reveals that the plaintiffs have, on numerous occasions, challenged the constitutionality upon due process and equal protection grounds of the statutory and regulatory provisions in issue.* (See State ex rel. Tank v. Teater, att. to deft's mem. as App's 5, 6 and 7; State of Ohio v. Rohr Fish Co., supra, App's 14 and 15; State of Ohio v. Port Clinton Fisheries, supra, App 16). As a result, the plaintiffs are now barred from pursuing such claims in this court. See Brown v. Felson, 442 U.S. 127, 131 (1979); Silcox v. United Trucking Service, Inc., 687 F.2d 848, 852 (6th Cir. 1982); Harrington v. Vandalia-Butler Board of Education, 649 F.2d 434, 437 (6th Cir. 1981).

A similar result, however, does not follow in regard to plaintiffs' claims pursued under the Commerce and Supremacy Clauses of the Constitution. It does not appear that the plaintiffs have ever fully or fairly litigated these claims. As a result, this court must necessarily reach a decision regarding their merits. See Winters v. Lavine, 574 F.2d 46, 56 (2d Cir. 1978).

* Each plaintiff has either actually done so, or via the doctrine of virtual representation has, in effect, done so. See Montana v. United States, 440 U.S. 147 (1979).

III.

COMMERCE CLAUSE

In their complaint, plaintiffs allege that O.R.C. §1533.63 and Ohio Division of Wildlife Regulation 1501:31-3-02 place an undue burden on interstate commerce in violation of the Commerce Clause of the Constitution (Compl. ¶18). Were it not for the Supreme Court's decision in Hughes v. Oklahoma, 441 U.S. 322 (1979), plaintiffs' allegation would merit little more than cursory consideration. In Hughes, supra, however, the Supreme Court explicitly brought state fish and game laws and regulations within the purview of the Commerce Clause. Overruling Geer v. Connecticut, 161 U.S. 519 (1896), the Court disapproved of the previously well established common law legal fiction of state ownership of wild fish and game. The Court recognized that conservation and protection of wild animals is a legitimate state interest, and held that "States may promote this legitimate [interest] only in ways consistent with the basic principle that our economic unit is the nation." Hughes, supra, 441 U.S. at 33 (quoting H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949)).

In general, the Commerce Clause not only empowers Congress to legislate concerning interstate commerce, but has long been held to also act as a bar to the state actions which would discriminate against or unreasonably burden interstate commerce. See Minnesota v. Cloverleaf Creamery, 449 U.S. 456 (1981); Hughes, supra. State legislation which amounts to mere economic protection is almost per se invalid. Philadelphia v. New Jersey, 437 U. S. 617 (1978). In addition, legislation with otherwise valid purposes is also subject to being invalidated if it unreasonably burdens interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 187 (1970).

The statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce. Indeed, those most adversely affected are members of the local commercial fish industry. No Ohio industry is placed in a better position by the fishing restrictions than any similar out-of-state commercial fisherman. Commercial fishing of walleye has been banned to all. If anything, the restrictions act as a boon to out-of-state fishermen who may market their walleye in Ohio without local competition.*

However, a finding that the restrictions in issue operate "evenhandedly" does not terminate the inquiry into their burden upon interstate commerce. As the Supreme Court, in Pike v. Bruce Church, Inc., supra, stated:

> Where the state regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits . . . the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

* Such out-of-state commercial fishermen can sell walleye in Ohio provided that they meet the legal length requirements imposed by Ohio law (Mosley Dep. p.51; Mosley Aff. ¶13).

The burden of interstate commerce here is conformity with the fish length requirements governing the legal importation of certain species of fish into the state of Ohio. The state's interest in promulgating such requirements is its law enforcement interest. These requirements do not directly affect or protect Ohio walleye or other Ohio species of fish except insofar as they aid in the enforcement of the restrictions imposed upon commercial fishing in Ohio (Mosley Dep. p. 191; Scholl Aff.. ¶16). By regulating the importation and sale of walleye and other species of fish, the State of Ohio seeks to prevent circumvention of its law. This is a legitimate state interest. Andrus v. Allred, 444 U.S. 51 (1979); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936). As a result, plaintiffs' Commerce Clause challenge to the restrictions in issue must fail.

IV.

SUPREMACY CLAUSE

Plaintiffs' Supremacy Clause challenge to the fishing restrictions in issue is also lacking in merit. I can perceive of no conflict between those restrictions and the Great Lakes Fishing Act of 1956, 16 U.S.C. §931 et. seq. There is nothing in that Act relating to size or species restrictions for fish, and the Act specifically permits states to make and enforce regulations which do not conflict with those contained in the Act. See 16 U.S.C. §939b. As a result, plaintiffs' constitutional challenge premised upon the Supremacy Clause should be rejected.

CONCLUSION

Therefore, for all the foregoing reason, it is hereby RECCOMMENDED that defendants' motion for summary judgment be granted, and that plaintiffs' motion be denied.

/s/James Carr
United States Magistrate

No. 89-232

In The
Supreme Court of the United States

OCTOBER TERM, 1989

PORT CLINTON FISH COMPANY,
Petitioner

v.

THE STATE OF OHIO,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Where the State of Ohio has banned commercial fishing of walleye within Ohio, does a regulation which criminalizes possession of undersize walleye for the purpose of providing additional protection to those undersize walleye violate the commerce clause of the U.S. Constitution?

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The Opinion of the Ohio Supreme Court is reported at 43 Ohio St. 3d 93 and is attached to the petition for writ of certiorari as Appendix A. The Opinion of the Ohio Court of Appeals for the Sixth District is attached to the petition for writ of certiorari as Appendix B. The decision of the Toledo Municipal Court is attached to the petition for writ of certiorari as Appendix C.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES AND REGULATIONS INVOLVED

U.S. Const. Art. I, § 8, cl. 3 provides in pertinent part:

> The Congress shall have the Power . . . to regulate the commerce with foreign Nations, and among the several states . . .

Ohio Rev. Code Ann. 1533.63 (Baldwin 1984) provides in pertinent part:

> No licensed commercial fisherman, or person required to have a commercial fishing license under Section 1533.34 of the Revised Code, shall take walleye . . . from Lake Erie or its tributaries . . . All fish brought into the state from another state or country shall be subject to the laws of this state.

The Ohio Admin. Code §1501:31-3-02(1984) provides in pertinent part:

> (A) It shall be unlawful for any person to sell, buy, transport, take, catch, or possess . . . a walleye . . . less than 15½ inches in length, a walleye fillet or part fillet of a length less than 9½ inches . . . (E) It shall be unlawful for any person to take, possess, sell, buy, transport, or cause to be transported a quantity, container, boat load, catch, or haul of any species of fish referred to in this

rule containing more than ten percent by weight of undersize round filleted or headless fish.

STATEMENT OF THE CASE

On December 17, 1985, officers of the Ohio Division of Wildlife entered the facilities of Port Clinton Fish Company ("Port Clinton"), an Ohio corporation. (Appendix B, P. B-2.) The officers entered the cutting room and observed seven boxes of walleye fish. (Appendix B, P. B-2.) The boxes were marked Olmstead Foods of Canada. (Appendix B, P. B-2.) However, the officers did not know where the fish were actually caught. (Appendix B, P. B-3.) The officers measured the length of the fillets in the seven boxes. (Appendix B, P. B-2 and B-3.) They also weighed the total contents of the boxes and weighed the undersized fish. (Appendix B, P. B-3.) The officers then calculated that the boxes contained forty-two percent (42%) undersized walleye by weight. (Appendix B, P. B-3.) The quantity of fish in question was seized by the Ohio Division of Wildlife. (Appendix B, P. B-4.) Port Clinton was subsequently charged with possession of seven boxes of walleye, containing more than ten percent (10%) by weight of undersized walleye in violation of Ohio Rev. Code §1533.63 and Ohio Admin. Code §1501:31-3-02 (1984).

On March 19, 1987, the case was heard by the Toledo Municipal Court upon stipulated facts. After the stipulation of facts, Port Clinton made a motion for judgment of acquittal on the basis that Ohio Admin. Code §1501:31-3- 02(1984) was unconstitutional under the Ohio and U.S. Constitutions. The court denied the motion and Port Clinton was found guilty.

Defendant Port Clinton Fish appealed the denial of judgment of acquittal to the Court of Appeals for the Sixth Appellate District. On December 18, 1987, the Court of Appeals found the regulation to be constitutional and affirmed the trial court decision. On May 24, 1989, the Ohio Supreme Court affirmed the Appellate Court's decision.

SUMMARY OF ARGUMENT

There are four reasons for denying a writ of certiorari in this case. First, no new question of federal law has been decided by the court below. Rather, the principles for determining Commerce Clause issues in wildlife cases have previously been established by this Court in *Hughes v. Oklahoma,* 441 U.S. 322 (1979) and more recently restated in *Maine v. Taylor,* 477 U.S. 131 (1986).

Second, no conflict exists among the various courts which have examined the Commerce Clause issue presented in this case. The Ohio Supreme Court, the Florida Supreme Court and the U.S. District Court for the Northern District of Ohio have each examined the issue presented in this case. All of these courts concluded that a state imposed size limit on the possession of an aquatic species, such as walleye, does not violate the Commerce Clause even where the taking of that species is banned in waters of that State.

Third, the Ohio Supreme Court properly applied the principles in *Hughes* to the facts in the present case. The Ohio Supreme Court went through each step of the *Hughes* test and stated with specificity the reasons for its decision.

Fourth, the Ohio Supreme Court's decision in this case was correct. The purpose of the length limit in this case is to supplement the ban on commercial fishing of walleye. This court has previously recognized the need for supplemental methods of enforcement where the potential for commercial gain provides an incentive for evading such a ban. *Andrus v. Allard,* 44 U.S. 51 (1979); *Bayside Fish Flour Co. v. Gentry,* 297 U.S. 422 (1936). Since the length limit continues to apply both to Ohio and out-of-state walleye, it is non- discriminatory. Protection of immature walleye is necessary to the continued propagation of the species, and is therefore a legitimate local interest. Finally, the length limit is narrowly tailored to protect the most important portion of the walleye population, and is therefore the least intrusive method of protecting the state's interest. Thus, the length limit does not violate the Commerce Clause. This is the same

conclusion reached by the Ohio Supreme Court. Therefore, the court's decision is correct.

ARGUMENT

I. THE PRINCIPLES FOR DETERMINING COMMERCE CLAUSE ISSUES IN WILDLIFE CASES HAVE BEEN PREVIOUSLY ESTABLISHED BY THIS COURT.

In *Geer v. Connecticut,* 161 U.S. 519 (1896), this Court held that the Commerce Clause did not apply to state regulations regarding the taking and possessing of wild animals. However, in *Hughes v. Oklahoma, supra.* This Court overruled *Geer* and held that state regulations regarding the taking and possessing of wildlife are subject to the same well-established principles which apply to state regulation of other areas of commerce. This Court then stated those principles as follows:

> Under that general rule we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes at 336. More recently, this Court restated its holding in *Hughes* and reaffirmed the fact that traditional Commerce Clause principles apply to State regulation of wildlife. See *Maine v. Taylor, supra.* These principles are so clearly set forth in *Hughes* and *Taylor,* and in earlier cases such as *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970), that additional guidance to the states and to lower courts is not needed. No new principle of federal law is involved in this case. Thus, no further review of this case is necessary.

II. THE DECISION OF THE OHIO SUPREME COURT IS CONSISTENT WITH THE DECISION OF OTHER COURTS WHICH HAVE EXAMINED THIS ISSUE.

The Ohio Supreme Court is not the first court to examine the question presented in this case. This same issue has also been addressed by the U.S. District court for the Northern District of Ohio and by the Florida Supreme Court.

This issue came before the U.S. District Court in *Hosko v. Teater*, No. C80-542 (N.D. Ohio, Jan. 29, 1985) (Mag. Report and Recommendation adopted by order of Court dated March 25, 1985), (attached to the petition for writ of certiorari as Appendix D), which was a declaratory judgment action involving the same statute and administrative rule as in this case. In *Hosko*, the District Court applied the Commerce Clause test as set forth in *Pike v. Bruce Church, Inc., supra*. This test is in all respects the same as the version set forth in *Hughes*. The U.S. District court found that the regulations did not discriminate against interstate commerce and, if anything, gave an advantage to out-of-state fisherman by eliminating local competition. The District Court went on to uphold these same regulations, concluding that:

> By regulating the importation and sale of walleye and other species of fish, the State of Ohio seeks to prevent circumvention of its law. This is a legitimate state interest. *Andrus v. Allred*, 444 U.S. 51 (1979); *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422 (1936). As a result, plaintiffs' Commerce Clause challenge to the restriction in issue must fail.

See petitioner's Appendix D at page 23.

In *State of Florida v. Millington*, Fla. 377 SO. 2d 685 (1979), The Florida Supreme Court examined a case which was, in all significant ways, identical to the case at bar. In *Millington*, the defendant took from the Gulf of Mexico, at a point outside the State of Florida, a quantity of shrimp.

The shrimp were brought ashore at Tampa, Florida. Once ashore, the defendant was charged with being in possession of undersized shrimp in violation of Florida law. As in this case, Florida law at that time entirely barred the taking of shrimp in Florida waters.

The Florida Supreme Court upheld the statute despite contentions that it violated the Commerce, Due Process and Equal Protection Clauses of the U.S. Constitution. The court reasoned as follows:

> To the extent that section 370.15(2)(a), as it relates to possession of "small shrimp," may affect interstate or foreign commerce, we find that this result is purely incidental, indirect, and beyond the purpose of the legislation and does not invalidate the statute. We also find that the statute has a reasonable purpose, is of uniform application, and does not deny Millington due process or equal protection of the law. The enactment of this law is within the legislature's prerogative in exercising the police power of the state to protect and regulate the production of shrimp in Florida. The following statement by the Supreme Court in *Bayside* referring to the California statute, is relevant:
>
> > [A]nd to the extend that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effecutate the policy of the law by rendering evasion of it less easy . . .
>
> 297 U.S. 422 at 426, 56 S. Ct. 513 at 515, 80 L.Ed. 772. See also *Kenny v. Kirk*, 212 So.2d 296 (Fla. 1968).

Id. at 688. Thus, the Florida Supreme Court also upheld the use of size limits as a method of supplementing a ban on the taking of an aquatic species.

The Ohio Supreme Court's decision in the case represents the third time that a court system has examined the issue presented in this case. Each time the result has been the same. Since a consensus already exists on this issue, no further guidance is needed from this Court.

III. THE OHIO SUPREME COURT PROPERLY APPLIED THE PRINCIPLES SET FORTH IN *HUGHES.*

The Ohio Supreme Court, in upholding the length limit in this case, went through each step in the analysis established by this court in *Hughes.* With respect to the first element of the test, the Court found no discrimination. The Court stated that:

> Turning to the first prong of the *Hughes* test, we find the challenged regulations are "evenhanded" in that they neither favor local enterprise nor facially discriminate against interstate commerce. In reviewing precisely the same regulations as are presently before us, the United States District Court noted:
>
> "The statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce. Indeed, those most adversely affected are members of the local commercial fish industry. No Ohio industry is placed in a better position by the fishing restrictions than any similar out-of-state commercial fisherman. Commercial fishing of walleye has been banned to all. If anything, the restrictions act as a boon to out-of-state fisherman who may market their walleye in Ohio without local competition." *Hosko v. Teater* (Jan. 29,1985), N.D. Ohio No. C80-542, unreported, at 9. (Magistrate's report and recommendation adopted by order of court dated March 25, 1985.)
>
> The instant regulations meet the first element of the *Hughes* test.

State of Ohio v. Port Clinton Fish Co., supra, at 94.

With respect to the second element of the test, the Court found a legitimate state interest existed, concluding as follows:

> We need not dwell on the second element of the *Hughes* test. Obviously, the purpose of the statute and regulations is protection and conservation of wildlife, a legitimate state interest.

Id. at 95.

As to the third prong, the Court held that no less intrusive alternative existed. Specifically, the Court stated that:

> With the primary purpose of the length limitations being the protection of immature walleye, we see no better, i.e., less intrusive, means for the propagation of the species than the instant regulatory mechanism. Requiring that Ohio fish distributors observe a regulation clearly designed to ensure a plentiful walleye population in the future (and allowing these parties a ten percent "margin of error") is a feasible and practical way of accomplishing the intended goal. Additionally, the intrusion upon the affected parties (Ohio fish distributors) and the flow of commerce is *de minimis.*

Id. at 95.

Finally, The Ohio Supreme Court concluded the length limit did not violate the Commerce Clause:

> We conclude by holding that with a legitimate state purpose for the protection and propagation of walleye in the State of Ohio as its basis, and only minimal intrusion on the affected parties, Ohio Adm. Code 1501:31-3-02 does not violate the

> Commerce Clause of the United States Constitution . . . .

Id. at 95.

Since each step in the *Hughes* test was properly applied further consideration of this case is not warranted.

IV. THE OHIO SUPREME COURT'S JUDGMENT IN THIS CASE IS CORRECT.

Port Clinton has been convicted of possession of undersized walleye fish in violation of Ohio Rev. Code §1533.63 and Ohio Admin. Code §1501:31-3-02 (1984). Ohio Rev. Code §1533.63 also imposes a ban on commercial walleye fishing. The purpose of the length limit is to supplement the ban. In that way, even if the ban on commercial walleye fishing is evaded, propagation of the species is assured through protection of immature walleye. As noted by the Ohio Supreme Court, the length limit is "for the protection and propagation of walleye in the State of Ohio . . . ." *State of Ohio v. Port Clinton* at 95 (emphasis added).

The steps for determining whether the length limit violates the Commerce Clause Article I, Section 8, clause 3 of the U.S. Constitution were most recently set forth in *Maine v. Taylor, supra.*

> In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142, statutes in the second group are subject to more demanding scrutiny. The Court explained in *Hughes v.*

> *Oklahoma*, 441 U.S. 322, 336, (1979), that once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Id. at 138.

Thus, the first step in the analysis is to determine if the rule in question has only an incidental burden on interstate commerce or if it discriminates either on its face or in practical effect.

A. The Length Limit Does Not Discriminate Against Interstate Commerce.

Ohio Admin. Code 1501:31-3-02 does not discriminate against interstate commerce. As noted above, this question has been addressed by both the Ohio Supreme Court and by the U.S. District Court for the Northern District of Ohio. Both these Courts found that no Ohio citizen or business is placed in a better position than a non-Ohio citizen or business as a result of these regulations. Rather, when viewed together with the ban on walleye fishing, the regulations were actually a boon to out-of-state fisherman because the regulations eliminated local competition. *State of Ohio v. Port Cinton, supra; Hosko, supra.*

To summarize, there are four reasons why the length limit cannot be viewed as discriminatory. First, there is no attempt to hoard natural resources for the benefit of State residents only. Sport fishing of walleye remains available to everyone no matter what their state of residence. *See:* Ohio Rev. Code §1533.32; Ohio Rev. Code §1533.322. Second, the length limit applies to all fish, no matter where those fish are taken. Third, no Ohio industry is placed in a better position by the length limit than any similar out-of-state industry. All must abide by the same rules. Finally, there is no stoppage of walleye within the stream of commerce. Walleye may be freely

transported into the State so long as the length limit is met. Thus, any burden imposed on interstate commerce by the length limit is, at most, incidental and in no way discriminatory. The ban on commercial fishing imposed Ohio Rev. Code §1533.63 does not affect the nature of the burden imposed by the length limit. In fact, it benefits out-of-state fisherman by eliminating local competition. Thus, no discrimination exists.

B. The Impact of the Length Limit on Interstate Commerce is Insignificant in Comparison to the Protection it Provides Ohio Walleye.

Regulations which impose only incidental burdens on interstate commerce shall be upheld unless the burden is clearly excessive in relation to the local benefits. *Maine v. Taylor, supra.* Here, the benefit provided by the length limit is continued protection of immature fish and, in turn, the protection of the species as a whole. Both this Court and the Ohio Supreme Court have long recognized the importance of this policy. Even as early as 1904, the Ohio Supreme Court validated this policy by stating that:

> "It is within the power of a state to preserve from extinction fisheries in waters within its jurisdiction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish."

State v. French, 71 Ohio St. 186 at 200 (1904) (quoting *Lawton v. Steele* 152 U.S. 133 (1894)). Likewise, the importance of length limits as a tool for implementing this policy was specifically recognized by the Ohio Sixth District Court of Appeals in *State of Ohio v. Rohr Fish Co.* No. C 80-260 (Ohio 6th Dist. Ct. of App. Apr. 10, 1981), unreported.

There the court observed that:

> Requiring that fish be of a certain minimum length and weight before being commercially harvested

> will assure the maturation necessary to sustain a healthy fish population, and protect Ohio's fish from possible extinction.

See Appendix A at P. A-10. As a result, in those situations where commercial fishermen do illegally take walleye from Ohio waters, at least the immature walleye will be protected and the continued propagation of the species can be assured. Thus, the primary purpose of the length limit continues to be the protection of immature fish within state waters.

The ban on commercial walleye fishing does not eliminate the need for the length limit. This court has recognized that the government cannot be expected to achieve perfect enforcement of a ban such as the one imposed by Ohio Rev. Code §1533.63. For that reason, this Court has upheld statutes which criminalize the sale of wild animals which are lawfully obtained. In *Andrus v. Allard* (1979), 444 U.S. 51, this Court upheld a federal law in which sales of bald eagle feathers were criminalized even though the ban on sales applied both to lawfully and unlawfully obtained feathers. In upholding the law, the court reasoned that:

> It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.

Id. at 58 (footnote ommitted).

That case is analogous to the present case in that once walleye which have been unlawfully caught in Ohio waters enter the stream of commerce, they cannot be distinguished from walleye from other states. And as in *Andrus*, the threat

is magnified by the great potential for commercial gain. Thus, length limits are required to protect the immature fish from being illegally taken from Ohio waters and mixed with fish from other jurisdictions.

This same principle was applied in *Bayside Fish Flour Company v. Gentry* (1936), 297 U.S. 422. There this Court upheld a California statute that was similar to the length limit in Ohio Admin. Code 1501:31-3-02 in that the statute regulated fish brought into California even though the fish were legally taken in the waters of other states. The Court held that:

> [T]o the extent that the act deals with the use or treatment of fish brought into the state from the outside its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *People of State of New York ex rel. Silz v. Hesterberg,* 211 U.S. 31, 39, 40, 29 S.Ct. 10, 53 L.Ed. 75.
>
> If the enforcement of the act affects interstate or foreign commerce, that result is purely incidental, in direct, and beyond the purposes of the legislation. The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts.

Id. at 426.

These same principles were applied in *Hosko, supra,* by the U.S. District Court when it examined the regulations now at issue before this court. As stated in *Hosko, supra:*

> By regulating the importation and sale of walleye and other species of fish, the State of Ohio seeks to prevent circumvention of its law. This is a legitimate state interest. *Andrus v. Allard,* 444 U.S. 51 (1979); *Bayside Fish Flour Co. v. Gentry,* 297,

U.S. 422 (1936).

See petitioner's Appendix D at p. 23.

The same conclusion was also reached by the Florida Supreme Court in *Millington, supra*, and by the Ohio Sixth District Court of Appeals in this case. See Appendix A.

Thus, even with the ban on commercial walleye fishing, the length limit remains primarily concerned with protection of fish in Ohio waters. The fish protected by these regulations are the immature fish, the fish which have been recognized as being most important to the continued propagation of the species. Again, this Court has long recognized the importance of this interest.

The burden imposed on interstate commerce by the length limit is minimal: out-of-state suppliers may continue to sell their fish in Ohio so long as the fish meet the length requirements. Thus, the Ohio market remains open to them. Indeed, as an incidental effect, the ban on commercial walleye fishing assures out-of-state suppliers that as a group they will have a market in Ohio for their fish because it eliminates competition from Ohio fishing operations. As a result, the regulation of walleye fishing and distribution is actually a boon to out-of-state suppliers. In sum, the length limit protects immature Ohio walleye while still allowing out of state suppliers to distribute their walleye in Ohio. Thus, the burden on interstate commerce is minimal in comparison to the local benefits. Therefore, the length limit cannot be viewed as an unconstitutional barrier to commerce.

C. The Length Limit is the Only Means of Assuring the Protection of Immature Walleye.

Even if this Court assumes arguendo that the length limit does discriminate in some way against interstate commerce, the regulation must be upheld if it serves a legitimate local purpose, and that purpose could not be served as well by any other means. *Maine v. Taylor, supra.* As noted above, the purpose of the length limit is to assure that even if the

ban on commercial walleye fishing is somehow evaded, the State can assure the continued propagation of the species by protecting the immature walleye. Again, this is a legitimate state interest. *State v. French, supra; Andrus, supra; Bayside, supra.* The application of the length limit is the least instrusive method of protecting this interest. The Court in *Rohr, supra,* in discussing the length limits imposed by Ohio R.C. 1533.63, reasoned as follows:

> Just as there are no means by which to determine the age of bird feathers, *Andrus v. Allard, supra,* at 58, there are no effective means to distinguish fish taken in Ohio waters from fish taken in other fresh waters. This is particularly obvious when considering a body of water such as Lake Erie which is bordered by two countries and several states. Therefore, in order to protect Ohio's wildlife, R.C. 1533.63 must be applied to all fish found in possession within the state of Ohio. Failure to apply R.C. 1533.63 to fish brought into Ohio from other states or countries would not properly protect Ohio's wildlife, as it would facilitate the covert taking of undersized fish from Ohio. The possibility of covert operations is particularly great where financial gain may result from such activity. *Andrus v. Allard, supra,* at 58. This court finds that R.C. 1533.63 meets the third prong of the *Hughes* test.

See Appendix A at P. A-12 (emphasis added). Thus, since it is impossible to distinguish between illegal Ohio walleye and walleye legally taken in other jurisdictions, the length limit must be applied to all walleye in order to protect the immature Ohio walleye. There is no less burdensome method which would afford this necessary protection. Indeed, in upholding Port Clinton's conviction on appeal, Ohio's Sixth District Court of Appeals held that:

> [T]he only means of protecting the fish of Ohio is to apply the same law to all undersized fish being possessed in Ohio regardless of its origin.

See petitioner's Appendix B at page 12 (emphasis added). As a result, even if this Court holds that the length limit does discriminate against interstate commerce, the regulation must be upheld because it serves a legitimate local purpose, and that purpose could not be served as well by any other means.

In its petition, Port Clinton suggests that the ban on commercial walleye fishing and the record keeping provisions contained in Ohio R.C. 1533.63 are less intrusive methods of protecting the undersized fish in Ohio waters. With respect to the ban, again, the purpose of the length limit is to supplement the ban. This court has recognized the importance of such supplemental methods in *Andrus, supra,* and *Bayside, supra.* As to record keeping, any fish dealer who is willing to evade the ban on commercial walleye fishing would probably be willing to falsify records to hide the evasion. The size of a fish cannot be falsified. Thus, the length limit is the one sure method of supplementing the ban on commercial fishing.

In sum, the length limit supplements the ban on commerical walleye fishing by providing protection to the immature fish, thereby assuring the continued propagation of the species. This is a legitimate local interest. The length limit is nondiscriminatory and its affect on interstate commerce, if any, is incidental. Also, it is the only means available for protecting this important local interest.

Therefore, the length limit in Ohio Admin. Code 1501:31-3-02 does not violate the Commerce Clause of the U.S. Constitution. The Ohio Supreme Court in the present action applied these principles and reached the correct conclusion. As a result, Port Clinton's petition for a Writ of Certiorari must be denied.

CONCLUSION

The petition for Writ of Certiorari should be denied.

APPENDIX A

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio	:	C.A. No. L-80-260
Plaintiff-Appellee	:	Toledo Municipal
	:	Court No. CRB80-01603
v.	:	
Rohr Fish Company	:	OPINION
Defendant-Appellant	:	Decided: April 10, 1981

* * * * *

HEADNOTES

1. R.C. 1533.63 bears a rational relationship to Ohio's legitimate state interest in protecting the fish population in Ohio's waters and is a proper exercise of the state's police power.

2. R.C. 1533.63 is applied evenhandedly and does not prefer Ohio residents over nonresidents in possession of fish.

3. R.C. 1533.63 imposes an incidental burden upon interstate commerce and, therefore, does not violate the Commerce Clause of the United States Constitution.

4. R.C. 1533.63, being a properly enacted state police power regulation, is paramount to and a permissible invasion of one's right to acquire, possess, and protect property under Art. I, Sec. 1 of the Ohio Constitution.

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio	:	C.A. No. L-80-260
Plaintiff-Appellee	:	Toledo Municipal Court No. CRB80-01603
v.	:	
Rohr Fish Company	:	OPINION
Defendant-Appellant	:	Decided: April 10, 1981

* * * * *

Messrs. Reginald S. Jackson, Jr. and B. Thomas Handwork, Jr., Counsel for Appellant.

Mr. Frank D. Pizza, Prosecuting Attorney, by Mr. Jack Puffenberger, Assistant Prosecutor and Mr. William J. Brown, Attorney General by Ms. Linda Wilhelm, Assistant Attorney General, Counsel for Appellee

* * * * *

BARBER, J. This action was initiated by the filing of a complaint in the Toledo Municipal Court by agents of the state of Ohio, Department of Natural Resources, Division of Wildlife, charging defendant Rohr Fish, Inc., with being in possession of sixty (60) boxes of walleye fish containing more than ten per cent by weight of walleye less than fifteen and a half (15½) inches in length in Toledo, Ohio, in violation of Section 1533.63, Ohio Revised Code.

On April 28, 1980, the defendant moved to dismiss the complaint, charging that Section 1533.63 in its application in this case is in violation of the Ohio and United States Constitutions. The Toledo Municipal Court denied the motion to dismiss, and the matter proceeded to trial on June 23,

1980. At the conclusion of the state's case, the defendant-appellant moved for acquittal, which was denied. The defendant-appellant then presented its evidence. Both sides having rested, defendant-appellant again moved for acquittal which was denied. Based on the evidence and arguments made, the trial court made a finding of guilty, entered judgment, and imposed a fine.

This matter is now before this court on appeal from the judgment and fine imposed by Toledo Municipal Court alleging that the trial court erred in failing to grant the motion of defendant-appellant for acquittal. This action forms the sole assignment of error which is as follows:

> "THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION OF DEFENDANT FOR ACQUITTAL."

The facts reveal that Rohr Fish, Inc., (hereinafter called "Rohr Fish"), is an Ohio corporation engaged in the wholesale distribution of fish and seafood in Michigan and Ohio. Rohr Fish ordered sixty (60) boxes of walleye from the Western Fish Company at Detroit, Michigan. The fish were transported into Ohio and put in a freezer at the Great Lakes Warehouse in Toledo, Ohio, where they were found and confiscated by agents of the state.

Western Fish Company acquires its supply of fish from Canadian suppliers, and then processes the fish in Michigan. The fish confiscated in this case were marked, "Product of Canada" and thus were allegedly involved in interstate and foreign commerce.

The defendant-appellant first urges before this court that on the fact situation of this cause, R.C. 1533.63 is unconstitutional as an impermissible interference with interstate commerce and is thereby in violation of the commerce clause of the United States Constitution.

Thus, this court has before it for determination question, as applied to Rohr Fish, does R.C. 1533.63 violate the

commerce clause of the United States Constitution, Article I, Section 8, Clause 3, and various provisions of the Constitution of Ohio protecting property rights?

R.C. 1533.63 provides, in pertinent part:

> "No person shall take, buy, sell, barter, give away, deliver, ship, transport, or possess any package, container, or quantity with more than ten per cent by weight of undersized fish or any other species either round or filleted mentioned in this section or division order. The entire quantity of fish containing more than ten per cent by weight of undersized fish shall be confiscated along with its containers. No person shall buy, sell, offer for sale, transport, give away, barter, or possess a fish caught or taken out of season or in any manner prohibited, or a fish caught or taken unlawfully from in or outside the state. All fish brought into the state from another state or country shall be subject to the laws of this state." Underscoring supplied.

It is uncontroverted by both parties to this cause that Ohio may, under its police powers, establish statutes to protect its wildlife, and particularly its fish; that R.C. 1533.63 is a proper exercise of the state's police power in that it bears a rational relationship to Ohio's legitimate state interest in protecting the fish population in Ohio's waters.

The defendant takes exception to the language of R.C. 1533.63, which allows for possible enforcement of this statute against Ohio commercial fish distributors who deal in fish from non-Ohio waters received in interestate commerce. It is argued by defendant that the state regulations in this case are reaching beyond the state border and are interfering with the free trade among the several states in contravention of the commerce clause of the United States Constitution.

It is interesting to note that both the defendant-appellant and plaintiff-appellee rely upon the recent United States Supreme Court case, *Hughes v. Oklahoma* (1979), 441 U.S.

322, as the controlling case in this area of law. We agree, but rather than follow *Hughes v. Oklahoma, supra,* implicitly, under the facts sub judice, it must be distinguished. A careful examination of *Hughes v. Oklahoma, supra,* indicates that the landmark case of *Geer v. Connecticut* (1896), 161 U.S. 519, was overruled by *Hughes v. Oklahoma, supra.* In *Geer v. Connecticut, supra,* the decision rested on the holding that no interstate commerce was involved because the state had the power, as representative of its citizens, who "owned" in common all wild animals within the state, to control the "ownership" of game that had been lawfully reduced to possession. Relying, then, on common ownership principles and regulation of that ownership by the state of Connecticut, the state virtually insulated any of its regulations of game from a constitutional attached based on the commerce clause, because the game never became the subject of interstate commerce, always intrastate commerce.

The court in *Hughes v. Oklahoma, supra,* specifically refused to perpetuate the legal fiction of "common ownership" of wildlife. *Hughes v. Oklahoma, supra,* recognized the legitimate interest a state has in the preservation of its wildlife, but ruled that challenges under the commerce clause to state regulations of wildlife should be considered according to the same general rules applied to state regulations of other natural resources. *Hughes v. Oklahoma, supra,* at 335. Futhermore, the burden to show the discriminatory effect of a statute rests on the party challenging the validity of the statute. *Hughes v. Oklahoma, supra,* at 336. The United States Supreme Court, in applying these general rules governing other natural resources, followed the rule of *Pike v. Bruce Church, Inc.* (1970), 397 U.S. 137, and formulated a three-prong test wherein the court must inquire:

> "(1) Whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

> "(2) Whether the statute serves a legitimate local purpose; and if so,
>
> "(3) Whether alterative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes v. Oklahoma, supra,* at 336.

In other words, *Hughes v. Oklahoma, supra,* did not rule that any state regulatory statute in conflict in any way with the commerce clause is prohibited per se. What *Hughes* did rule is that if all three prongs of the *Hughes* test are met, then any affect which the state regulation has on interstate commerce must be viewed as incidental or indirect, and any burden which the statute imposes on interstate commerce is permissible. *Pike v. Bruce Church, Inc., supra,* at 142. This court finds that the three prong test is successfully met by R.C. 1533.63.

The first prong of the *Hughes* test requires that a statute have only an incidental or nondiscriminatory effect on interstate commerce. This calls for a delicate balancing of interests. The United States Supreme Court recognized the requirement of balancing of interest in areas where activities of legitimate local public interest overlap with the national interest expressed by the commerce clause, a task which "necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc., v. Rice* (1978), 434 U.S. 429. Thus, it can be observed that no single conceptual approach indentifies all the factors that may bear upon a particular case.

In *Hughes v. Oklahoma, supra,* the Oklahoma statute prohibited the transportation or shipping outside of Oklahoma for sale, natural minnows procured from waters within Oklahoma. The practical effect of the Oklahoma statute was to limit the use of a natural resource of the state of Oklahoma to the residents of that state to the exclusion of residents of another state, thereby blocking the flow of commerce at

the state border. The Supreme Court viewed the discrimination effectuated by the Oklahoma statute as a very serious impediment to the flow of interstate commerce and, therefore, struck it down. To illustrate the impermissible results of such legislation the Supreme Court cited the following language from *West v. Kansas Natural Gas Co.* (1911), 221 U.S. 229, wherein Oklahoma had contended that it possessed the right to "conserve" natural gas for the use of its own residents.

> ". . . If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals . . ." *West v. Kansas Natural Gas, supra,* at 255.

This type of restrictive burden on interstate commerce is the very restriction that our forefathers in their wisdom sought to prohibit to the states by the commerce clause of the Constitution, thereby fostering free trade among all the states. *Hughes v. Oklahoma, supra,* makes clear that the states may promote their legitimate purpose of conservation of a natural resource only in ways consistent with the basic principal that, "our economic unit is the Nation," *Hood & Sons, Inc. v. Du Mond* (1949), 336 U.S. 525 at 537.

R.C. 1533.63 is totally distinguishable from the Oklahoma statute challenged in *Hughes v. Oklahoma, supra.* The Ohio statute does not discriminate in favor of Ohio residents to the exclusion of non-residents. Rather, R.C. 1533.63 is absolutely evenhanded in its effect in that it is applied to Ohio residents and non-residents to the same extent and in the same manner. Nor does R.C. 1533.63 have the effect of hoarding for Ohio residents the natural resources of Ohio. Furthermore, R.C. 1533.63, unlike the Oklahoma statute in *Hughes v. Oklahoma, supra,* does not block the flow of commerce at the state border.

The Court of Appeals for Miami County, Ohio, has specifically held in the second and third syllabi of *Salasnek Fisheries, Inc. v. Cashner* (1967), 9 Ohio App. 2d 233:

"2. The state may, in the exercise of its police power, forbid by statute the possession of fish smaller than a specified size, even though legally taken and processed outside the state and thereafter brought into the state.

"3. In the proper enforcement of state conservation measures, any effect upon interstate commerce is incidental and inconsequential."

Defendant-appellant asserts that R.C. 1533.63 "attempts to exclude the consumption" of certain fish by residents of Ohio. For this reason, defendant-appellant contends that this statute falls under the ruling in *Hughes v. Oklahoma, supra.* The "exclusion" cited by defendant-appellant is distinguishable and certainly is not of the type prohibited by *Hughes v. Oklahoma, supra. Hughes v. Oklahoma, supra,* prohibits a state from favoring its residents by allowing only residents to enjoy the benefits of the state's natural resources, thereby excluding non-residents from such enjoyment. The ruling in *Hughes v. Oklahoma, supra,* cannot be expanded to cover the fact situation, where Ohio, under its police power, restricts its own residents from taking, possessing or using undersized fish. This is clearly within the province of the state and does not discriminate in favor of residents as proscribed by *Hughes v. Oklahoma, supra.*

Defendant-appellant contends that R.C. 1533.63 establishes an unconstitutional barrier to fish entering Ohio from other states. In support of this argument, defendant-appellant cites several United States Supreme Court cases. *Great Atlantic & Pacific Tea Co. v. Cottrell* (1976), 424 U.S. 366; *Dean Milk Co. v. City of Madison* (1951), 340 U.S. 349. A close examination of those cases indicates the Supreme Court looked beyond the state policy power pretext of the statutes to their actual purpose, which was economic protectionism of a state industry. The statutes under challenge were found to be an attempt by the state to control competition and protect the economy of the state and, therefore, objectionable. Economic protectionism is an improper basis for any statute which interferes with interstate

commerce. To that extent, such cases are distinguishable and are not controlling under the fact situation sub judice. R.C. 1533.63 cannot be persuasively attacked as an economic protectionism measure. The statute does not give preferential treatment to Ohio residents, nor does it attempt to create a commercial monopoly for resident commercial fisherman.

Because R.C. 1533.63 is totally evenhanded in its application and does not discriminate in favor of Ohio residents to the exclusion of non-residents, either on its face or in practical effect, and because it does not block the flow of interstate commerce at Ohio's borders, but exerts only 'incidental' effects on interstate commerce, R.C. 1533.63 meets the first prong of the Hughes test.

The second prong of the Hughes test requres that the statute serve a legitimate local purpose. This prong is not seriously questioned by either the defendant-appellant or plaintiff-appellee. Suffice it to say that *Hughes v. Oklahoma* recognizes the legitimate interest which a state has in the protection and conservation of its wildlife. Several Ohio cases recognize the legitimate interest which a State has in the preservation of its wildlife. *State v. Switzer* (1970), 22 Ohio St. 2d 47; *State v. Hanlon* (1907), 77 Ohio St. 19; *Salasnek Fisheries, Inc. v. Cashner* (1967), 9 Ohio App. 2d. 233. Therefore, R.C. 1533.63 is found to meet the second prong of the Hughes test.

The third prong of the Hughes test considers whether alternative means could promote this local purpose as well without discriminating against interstate commerce. The only effective means of assuring the continued existence of a fish population in Ohio waters is to allow Ohio fish to mature and propagate. Requiring that fish be a certain minimum length and weight before being commercially harvested will assure the maturation necessary to sustain a healthy fish population, and protect Ohio's fish from possible extinction. Enforcing of R.C. 1533.63 concerning all fish in Ohio, regardless of origin, is the only available and effective means of promoting the legitimate purposes of the state. Several

cases have been cited by the plaintiff-appellee which touch upon the question under determination which this court finds pertinent. In *Bayside Fish Flour Co. v. Gentry* (1936), 297 U.S. 422, the United States Supreme Court upheld certain California fish and game laws that regulated the processing of sardines in California, whether the sardines were taken within or outside the waters of the state. The California statute considered in *Bayside Fish Flour Co. v. Gentry, supra,* was similar to R.C. 1533.63 in that it could, potentially, be enforced against persons briging into California fish legally taken outside the state's waters. In upholding the California statute the Supreme Court stated:

> ". . . to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of its less easy . . . citation omitted.
>
> ". . . The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts." *Bayside Fish Flour Co. v. Gentry, supra,* at 426.

Cases decided after *Hughes v. Oklahoma, supra,* also have followed the concept of upholding state statutes enacted under the police power regulating the possession of Wildlife within a state regardless of its origin. *United States v. Sylvester* (9th Cir. 1979), 605 F. 2d 474, was decided several months after the Hughes decision, and therein set forth the following proposition:

> ". . . a State may reach beyond its borders under its police power, to regulate game and fish if those regulate game and fish if those regulations have a sufficient nexus with the protection and preservation of wildlife within the State." *United States v. Sylvester, supra,* at 475.

Another case in point cited in plaintiff-appellee's brief is *Andrus v. Allard* (1979), 444 U.S. 51, also decided several months after Hughes. *Andrus v. Allard, supra,* involved a challenge to the Eagle Protection Act and Migratory Bird Treaty Act which forbade the taking, possessing, selling, purchasing, bartering, offering to sell, transporting, exporting, or importing of bald or golden eagles, migratory birds, or parts thereof. The persons challenging the acts were prosecuted for selling "pre-existing" Indian artifacts partly composed of feathers of currently protected birds. The defendants challenged the Acts arguing that the statutory protection of wildlife is not furthered by an embargo upon traffic in avian artifacts that existed before the statutory safeguards came into effect. In rejecting this argument, and upholding the validity of both Acts, the Court stated:

> "The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a power incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evaison as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.
>
> * * *
>
> "The prohibitions of the statute were devised to resist any evasion, whether in the sale of feathers as part of datable artifacts or in the sale of separate undatable bird products. Moreover, even if there were alternative ways to insure against statutory evasion, Congress was free to choose the method it found most efficacious and convenient. "[T]he

> legislature . . . is authorized to pass measures for the protection of the people . . . in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.' *New York ex rel. Silz v. Hesterberg,* 211 U.S. 31, 40 (1908)." Footnotes omitted). *Andrus v. Allard, supra,* at 58.

Therefore, the court declined to invalidate Congress' judgment that effective regulation may require inclusion of possibly innocent conduct and held that the legislature could reasonably proscribe all transactions in eagle and migratory bird parts, even those parts that were lawfully acquired.

Just as there are no sure means by which to determine the age of bird feathers, *Andrus v. Allard, supra,* at 58, there are no effective means to distinguish fish taken in Ohio waters from fish taken in other fresh waters. This is particularly obvious when considering a body of water such as Lake Erie which is bordered by two countries and several states. Therefore, in order to protect Ohio's wildlife, R.C. 1533.63 must be applied to all fish found in possession within the state of Ohio. Failure to apply R.C. 1533.63 to fish brought into Ohio from other states or countries would not properly protect Ohio's wildlife, as it would facilitate the covert taking of undersized fish from Ohio. The possibility of covert operations is particularly great where financial gain may result from such activity. *Andrus v. Allard, supra,* at 58. This court finds that R.C. 1533.63 meets the third prong of the Hughes test.

We move now to defendant-appellant's contention that enforcement of R.C. 1533.63 violates the Constitution of the state of Ohio. Article I, Section 1 of the Ohio Constitution provides that "acquiring, possessing, and protecting property" are inalienable rights of all men. Defendant-appellant argues that the right to contract is protected by this provision of the Constitution of Ohio; that the state must use reasonable means in the exercise of its police powers when it attempts to affect the right to contract. This court finds that this to be an accurate statement of law of Ohio.

It is a well-established principle, however, that property is held subject to the general police power of the state and may be regulated pursuant to the police power. *Porter v. City of Oberlin* (1965), 1 Ohio St. 2d 143. The Constitution of Ohio specifically recognized the subordination of private property to the general welfare. Article I, Section 19 of the Constitution of Ohio.

The Ohio Supreme Court in *Benjamin v. Columbus* (1957), 167 Ohio St. 103, sets forth the following standard for reviewing challenges to police power regulations:

> "Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section I of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section I or Article XIV of the Amendments to the Constitution of the United States, an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.
>
> "Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them." *Benjamin v. Columbus, supra,* at 103.

Ohio courts have rarely been persuaded by challenges to statutes enacted pursuant to the state's police power and person challenging statutes enacted on police power grounds have a heavy burden. In a recent Ohio Supreme

Court decision, upholding a municipal ordinance enacted pursuant to the city's policy power, the court defined the burden which must be met in order to strike down a police power regulation as follows:

> ". . . it is incumbent upon the party alleging unconstitutionality to bear the burden of proof, and to establish his assertion beyond a reasonable doubt." *Hilton v. Toledo* (1980), 62 Ohio St. 2d 394, at 396.

It is long and firmly established principle that courts must indulge a strong presumption in favor of the constitutionality of legislation. *State ex rel. v. Dickman v. Defenbacher* (1955), 164 Ohio St. 142. The presumption of constitutionality of legislation applies with particular emphasis on police power legislation. *League for Preservation of Civil Rights & Internal Tranquility, Inc. v. Cincinnati* (1940), 64 Ohio App. 195, dismissed for want of debatable constitutional question. (1940), 136 Ohio St. 561.

This court finds that R.C. 1533.63 is a valid police power regulation related to legitimate state interest and that it is a reasonable exercise thereof. Therefore, any affect with R.C. 1533.63 has upon defendant- appellant's right to contract is permissible. Defendant-appellant's assignment of error is not well taken.

On consideration whereof, the court finds that the defendant-appellant was not prejudiced or prevented from having a fair triai, and judgment of the Toledo Municipal Court is affirmed. This cause is remanded to said court for execution of fine and costs. Costs to defendant-appellant.

JUDGMENT AFFIRMED

CONNORS, P.J. AND DOUGLAS, J., concur.

APPENDIX B

STATE OF OHIO)
COUNTY OF LUCAS)
CITY OF TOLEDO)

IN THE MUNICIPAL COURT

STATE OF OHIO	:	
Plaintiff	:	C. A. No. L 87-148
v.	:	
	:	No. CRB86-11441
PORT CLINTON FISH CO.,	:	
Defendant.	:	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, That the above-entitled case came on for hearing before the Honorable Denise Ann Dartt in Courtroom Number 9, Regional Criminal Justice Center, Toledo, Ohio, commencing on the 19th day of March, 1987.

APPEARANCES:

On Behalf of the State
Mark S. Schmollinger

On Behalf of the Defendant
Steven R. Smith
Reginald S. Jackson, Jr.

MR. SCHMOLLINGER: This is the State of Ohio vs. Port Clinton Fish Company. Venue has been stipulated in this case and identification of the Defendant as the Port Clinton Fish Company. The Defendant representative of the Port Clinton Fish Company is here today. State your name, please.

THE DEFENDANT: Michael T. Metcalf.

MR. SCHMOLLINGER: After being sworn, the officers involved, Officers Tetzlaf and Donnelly, would testify as follows: That they are officers of the Ohio Fish and Game Department, that they on December 17, 1985, at approximately ten-thirty, entered Port Clinton Fish Company at 1949 Broadway in Toledo, Ohio; that Officer Tetzlaf made a visual inspection of the fish displayed. The species were White Bass, Walleye, White Perch, Yellow Perch, Whitefish, along with some saltwater species. All freshwater fish conformed with the Ohio size limit.

Upon entering the wholesale cutting room, it was noted that there were several boxes, I.Q.F. Walleye fillets contained in Olmstead Food boxes. The officer would testify Olmstead Foods is a Canadian company.

An inspection was made by Officer Tetzlaf. Officer Donnelly proceeded to walk in the walk-in cooler and inspected the Yellow Perch fillets along with other freshwater species. The inspection revealed the I.Q.F. Walleyes were running 50 percent undersize.

At this time Officer Donnelly began inspecting the fillets with Officer Tetzlaf observing. Their inspection was conducted over seven boxes. These boxes were in the possession of the Defendant, its agents or employees.The measurements in weighing were made.

In Box Number 1 it was determined that there were 5.5 pounds illegal; 6.5 pounds legal in weight. I want to indicate for the record each box is 12 pounds total weight. Again in Box Number 1 it was determined 45.8 percent were undersized.

Going to Box Number 2, the total weight of 12 pounds, 6 pounds were found to be illegal; 6 pounds legal for a total percentage of 50 percent undersize.

Box 3, total of 12 pounds, 4.5 were determined to be illegal; 7.5 legal, a total of 37.5 percent undersize.

Box Number 4, total weight of 12 pounds, 5.5 pounds were found to be illegal; 6.5 pounds were found to be legal for a total of 46 percent undersize.

Box Number 5, total weight of 12 pounds. Legal weight 8 pounds; illegal weight 4 pounds; 33.3 percent undersized.

Box Number 6, total weight of 12 pounds. There were 4 pounds illegal; 8 pounds legal for a total of 33.3 percent undersized.

Finally, Box Number 7, total weight of 12.5 pounds, illegal 6 pounds; legal 6.5 pounds for a total undersized weight by percentage of 48 percent.

Now, he totaled all seven boxes. The total weight of Walleye fillets was 84.5 pounds. Total weight of undersized Walleye was 35.5 pounds. Total weight of undersized Walleye was 35.5 pounds for a percentage based conclusion of 42 percent undersized by weight, and that conclusion covering all seven boxes.

The officer would further testify that it was unknown at the time of the inspection where the fish, in fact, were caught, but he did observe the Olmstead Food boxes. They were charged then for this offense on December 17, 1985, of being unlawfully in possession of 7 containers, 84 and a half pounds of Walleye fillets. There's a technical legal name for fillet; I can't pronounce it. It's a Latin term, S-T-I — it's typed in this page I think this is the word — S-T-I-Z-O-S-T-E-D-I-O-N; Second word V-I-T-R-E-U-M; Third word V-I-T-R-E-U-M, and that the foregoing fish as I described, contained more than 10 percent undersized by weight as being contrary to R.C. 1533.63 and O.A.C. Rule

1501:31-3-02(A). The State represents that both officers would have testified the fish were seized?

MR. JACKSON: Yes.

MR. SCHMOLLINGER: The fish were seized at the time of the inspection. That's all I have to add. I think the State would rest at that point.

MR. JACKSON: We would stipulate to those facts.

THE COURT: Go ahead.

MR. JACKSON: At this time we would move for judgment of acquittal and on the basis that the Statute and the Regulation is a violation of the Ohio and the United States Constitution insofar as the State has failed to prove that the fish that were seized and the fish which are evidence in this case and upon which the violation is charged were captured in the waters of Ohio or that they are Ohio fish.

I believe the evidence is that the fish were from Canada; they were shipped in from Canada, and the Statute is improper — an improper attempt in interfering with foreign commerce.

MR. SCHMOLLINGER: Interstate commerce.

MR. JACKSON: And interstate commerce, but also foreign commerce.

MR. SMITH: To add to the motion for acquittal, there was no legitimate purpose served by the Regulation and Statute in that commercial fishing of Walleye in Ohio is banned totally, so that the effect of the Regulation is an unconstitutional interference with interstate and foreign commerce for no legitimate state purpose.

THE COURT: Mr. Prosecutor, do you wish to respond to Defendant's motion for judgment of acquittal?

MR. SCHMOLLINGER: Only in that we would make the argument that it's possession is what is criminalized. We've shown I.D. and venue and they were in violation of both the Statute and the Regulation, again which is directed toward possession of the species of fish involved being over more than 10 percent by weight of undersized fillets, and that would conclude the City's statement.

THE COURT: All right. Case is called for trial. City present. Defendant present with counsel. Both City and Defendant enter in certain stipulations, including stipulations as to venue and identification of the Defendant. The Defendant moves for judgment of acquittal. Upon consideration of Defendant's argument, including the argument of unconstitutionality of the Statute and the City's response, the motion for judgment of acquittal is found not well taken and the same is hereby denied. Defendant found guilty. Fine of $100.00 plus costs. I'll grant you a stay on the fine and costs for 30 days. Stay on fine and costs to April 20th, 1987.

MR. JACKSON: Thank you.

MR. SMITH: Just a technicality. It's really the State, not the City, just to make your docket clear.

THE COURT: This case is under O.R.C.?

MR. SCHMOLLINGER: Correct, under the O.R.C. and by the State people, Department of Natural Resources, Division of Wildlife.

(Hearing concluded.)

CERTIFICATE

I, Anne H. Blacketer, a Notary Public and Official Shorthand Reporter within and for the State of Ohio do hereby certify that the foregoing transcript is a true and accurate transcription of the proceedings as set forth.

/s/ Anne H. Blacketer

(Anne H. Blacketer)
Official Shorthand Reporter
Toledo Municipal Court